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CITATIONS

659029—45

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 118

JAMES PICARELLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the Circuit Court of Appeals (R. 129–130) has not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered May 12, 1945 (R. 131). The petition for a writ of certiorari was filed June 8, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

The sole question presented is whether the evidence is sufficient to sustain petitioner's conviction.

STATUTE AND REGULATION INVOLVED

Section 2 (a) of the Act of June 28, 1940 (54 Stat. 676), as amended by the Act of May 31, 1941 (55 Stat. 236), and by Title III of the Second War Powers Act of March 27, 1942 (56 Stat. 177), 50 U. S. C. App., Supp. IV, 633, provides in part:

> (2) * * * Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.
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> (5) Any person who willfully performs any act prohibited, or willfully fails to perform any act required by, any provision of this subsection (a) or any rule, regulation, or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall, upon conviction, be fined not more than $10,000 or imprisoned for not more than one year, or both.
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> * * * * *

> (8) The President may exercise any power, authority, or discretion conferred on him by this subsection (a), through such department, agency, or officer of the Government as he may direct and in conformity with any rules or regulations which he may prescribe.

Ration Order No. 5A (7 F. R. 5225, as amended, 7 F. R. 7399), issued by the Office of Price Administration pursuant to the authority of Section 2 (a) (2) and (8) of the Act of June 28, 1940, as amended (*supra*), provided in pertinent part as of the date of the offense involved here:

> § 1394.1102 (c). No person shall have in his possession any gasoline coupon book or bulk, inventory or other coupon (whether or not such book was issued as a ration book and whether or not such coupon was issued as a ration or as part of a ration book), or exchange certificate, except the person or the agent of the person, to whom such book, coupon or certificate was issued, or by whom it was acquired, in accordance with the provisions of Ration Order No. 5A.

STATEMENT

On May 5, 1944, petitioner and Thomas J. Ward were charged in a one-count information filed in the District Court for the Southern District of New York with unlawfully having in their possession certain gasoline ration coupons, in violation of Ration Order No. 5A and the Second War Powers Act (R. 2, 4). After a jury trial, they

were each convicted (R. 92) and sentenced to imprisonment for nine months and fined $500 (R. 108, 111, 112). Upon appeal to the Circuit Court of Appeals for the Second Circuit, the convictions were affirmed (R. 129–130, 131).

The evidence adduced at the trial may be summarized as follows:

On November 9, 1943, Trihy and McElhone, two officers of the New York City Police Department, observed an automobile parked in the street near a vacant lot. The officers saw petitioner leave the car, walk to the lot, pick up some empty bottles, and return with them as far as the door of the car. At this point, and while petitioner was standing on the sidewalk, officer Trihy looked into the car and saw Ward on the back seat examining some small cards bearing names and addresses and, in many instances, the notation "A" written in crayon. (R. 12, 13, 15.) Trihy entered the car and asked Ward what his occupation was, to which Ward replied that he was a "bookmaker." Trihy testified that he thereupon took a paper bag from Ward's lap and, upon examination, found that it contained 8271 "A" gasoline ration coupons. (R. 12.) Trihy then directed petitioner to get in the car and drive to the station house. While en route, petitioner said to Trihy, "Listen, Officer, can't we talk this thing over?" Trihy replied, "No talking over. This is a Government offense. Drive to the station house." (R. 21.)

At the station house, petitioner and Ward were questioned by one Kaye, an investigator from the Office of Price Administration (R. 21). Kaye testified that Ward told him that the bag was in his lap when Trihy entered the car (R. 44). Kaye further testified that petitioner informed him that he was a bookmaker (R. 41), that he had owned the car prior to March 1943, at which time he sold it to one Greco, and that Greco had resold it to him a day or two before the arrest (R. 40). Greco was then summoned to the station house and questioned. Kaye testified, without objection, that Greco denied having left any ration coupons in the car (R. 40–41). Trihy testified that he heard petitioner tell Kaye that Ward said he had found the coupons in the car (R. 23).

When called in rebuttal, Trihy testified that at the station house he searched Ward while McElhone searched petitioner, and that he and Kaye searched the car outside the station house, but that they found no evidence of bookmaking. Trihy further testified that from the time of the arrest until the completion of the search, he and McElhone kept petitioner and Ward under constant surveillance and that neither had been observed to hide or destroy any racing slips or other betting paraphernalia. (R. 76, 77, 78, 79, 80.)

It was stipulated that neither Ward nor petitioner was entitled to possession of the coupons (R. 9–11), which were proved to be genuine (R.

47). Both the coupons and the cards taken from Ward at the time of the arrest were admitted in evidence as against him, but not as against petitioner (R. 16, 20, 49, 50, 83).

Petitioner did not take the stand or offer any witnesses in his defense (R. 74).

Ward testified that just before the arrest he had met petitioner in the latter's car at a nearby street corner, and that petitioner then drove him to the place where the arrest was made (R. 68). Ward maintained that the bag was not on his lap as testified by Trihy and as Ward, according to Kaye's testimony, had admitted immediately after the arrest (see pp. 4, 5, *supra*) Ward declared that when he got into the car after meeting petitioner he noticed that the bag was stuck between the end of the seat and the side of the car, and that it was from that place that Trihy took the bag. (R. 69.)

The court charged the jury, *inter alia,* as to the presumption of innocence, the right of a defendant not to testify, the burden on the Government to establish its case beyond a reasonable doubt, and the meaning of reasonable doubt (R. 85–89). Petitioner did not except to the charge, but requested the additional charge that even though the ration coupons were discovered in his car he could not be found guilty of unlawful possession unless he had guilty knowledge of their presence. This request was granted (R. 90).

ARGUMENT

Petitioner contends (Pet. 4–10) that the trial court committed reversible error in denying his motions for a directed verdict made at the close of the Government's case and again at the end of the entire case, because there was no evidence from which the jury could find beyond a reasonable doubt that he knowingly and unlawfully had the ration coupons in his possession. He argues (Pet. 9) that since the trial court refused to admit the coupons themselves in evidence against him, there was no basis for permitting the case as against him to go to the jury. We submit that, viewing the evidence and the inferences to be drawn therefrom in the light most favorable to the Government (*Glasser* v. *United States,* 315 U. S. 60, 80), the contention and argument are untenable.

The uncontroverted evidence shows that this large quantity of ration coupons, to the possession of which neither petitioner nor Ward was entitled, was found in the immediate possession of petitioner's companion and codefendant Ward, who at the time was sitting in an automobile belonging to petitioner, apparently waiting for the latter to return to the car from the vacant lot near which they had parked, and that after being arrested petitioner said to the officer, "Listen, Officer, can't we talk this thing over?" (See p. 4, *supra.*)

Although he did not take the stand at the trial, petitioner now suggests (Pet. 10) that the inquiry

he made of the officer should be construed as having been prompted by the idea that he had been apprehended for bookmaking, and not because he had any consciousness of guilty possession of ration coupons. However, it is to be noted that he made no comment and asked for no explanation when the officer replied, "No talking over. This is a Government offense," which in common parlance and in the context in which it was uttered obviously meant a Federal offense. A more likely inference is that petitioner's silence after being told that he was involved in a "Government" offense indicated that he understood the illegal possession of gasoline coupons was meant. Since no innocent explanation of the episode was made to appear by evidence, we submit that petitioner's attempt to effect a settlement might be regarded by the jury as evidencing consciousness of guilt of the offense charged. *Christian* v. *United States,* 8 F. 2d 732, 733 (C. C. A. 5) and cases cited; 4 Wigmore, *Evidence,* 3d ed., p. 31.

The jury also may have believed the testimony of Ward in so far as he stated that shortly before his apprehension he had observed the bag containing the coupons stuck between the seat and the side of the car, while disbelieving that part of it in which he said that he did not have the bag on his lap. This, coupled with petitioner's admission that he owned the car and his statement that Ward told him that he had found the coupons in

the car, together with the suspicious character of the suggestion that the arresting officer talk things over with petitioner, justified sending the case to the jury.

Petitioner's further contention (Pet. 8–9), in effect, that on the basis of applicable principles relative to conviction upon circumstantial evidence the facts in this case cannot support a verdict of guilty, is without substance. The rule as to circumstantial evidence is that where guilt depends upon such evidence, the evidence, considered *in toto,* must be inconsistent with the theory of innocence, or, as stated in the citations to which petitioner refers, exclude every reasonable hypothesis except guilt. This means, we believe, no more than that a jury should not be allowed to speculate as to a defendant's guilt in a case where the circumstantial evidence, considered as a whole, does not clearly point toward guilt. The rule does not require the exclusion of every hypothesis or possibility of innocence, but only any fair and rational hypothesis except that of guilt. Nothing in the rule prevents the jury from finding guilt entirely upon circumstantial evidence; and the requirement of proof beyond a reasonable doubt operates on the whole case and not upon separate bits of evidence. *United States* v. *Pape,* 144 F. 2d 778, 781 (C. C. A. 2), certiorari denied, 323 U. S. 752; *United States* v. *Feinberg,* 140 F. 2d 592, 594 (C. C. A. 2), certiorari denied, 322 U. S. 726;

United States v. *Valenti,* 134 F. 2d 362, 364–365 (C. C. A. 2), certiorari denied, 319 U. S. 761. Tested by these principles, the evidence here justifies the jury's verdict as to petitioner, and no sufficient reason appears why the concurrence of the district judge, the jury, and the Circuit Court of Appeals as to the sufficiency of the evidence should not be accepted as final. *United States* v. *Johnson,* 319 U. S. 503, 518; *Delaney* v. *United States,* 263 U. S. 586, 589–590.

CONCLUSION

The decision below is correct, the case does not present any question of general importance, and there is no conflict with decisions of other circuit courts of appeal or of this Court. It is respectfully submitted, therefore, that the petition for a writ of certiorari should be denied.

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